United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

462

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,771

UNITED STATES OF AMERICA, APPELLEE

v.

ODELL GRIFFIN, APPELLANT

Appeal from the United
States District Court for
the District of Columbia

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628-1194

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BRIEF FOR APPELLANT

ISSUES PRESENTED

(1) Was there sufficient evidence for a jury to have found the appellant to have aided and abetted the principal in second degree murder?

(2) Was there sufficient evidence for a jury to have found that appellant robbed the Gallaudet Market?

This case has not previously been before this Court.

REFERENCES AND RULINGS

On October 3, 1969, the trial Court denied appellant's motion for Judgment of Acquittal NOV.

STATEMENT OF THE CASE

On August 18, 19 and 20, 1969, the appellant was tried by a jury before Judge Howard F. Corcoran on a seven count indictment charging him with felony-murder, first degree murder, robbery while armed, robbery, and three counts of assault with a dangerous weapon. The jury found him guilty of second degree murder (as a lesser included offense of felony-murder), robbery while armed, and two counts of assault with a dangerous weapon. Judge Corcoran sentenced him to ten to thirty years for second degree murder, ten to thirty years for robbery while armed, and three to ten years for each of the two counts of assault with a dangerous weapon. He now appeals from his convictions for second degree murder and robbery while armed and the denial of his Motion for Judgment of Acquittal NOV as to those charges.

The evidence presented at trial showed the following. At approximately 1:15 P.M. on September 19, 1968, appellant and

a juvenile by the name of Percy Floyd entered the Gallaudet Market at 2001 Gallaudet Street, N.E., Washington, D.C. In the market at the time were Mr. and Mrs. Dunietz, the operators of the market, and a customer by the name of Lemuel H. Conic. Appellant and Percy conversed with Mr. Dunietz about the price of beer and left. A few minutes later they returned. Someone grabbed Mr. Conic from behind and threw him to the floor. Percy and Mr. Dunietz began to tussle and at one point Mrs. Dunietz began to struggle with one of the men. (Tr. 26-40, 153-157).

Mr. Dunietz began to push the appellant and Percy out the front door. (Tr. 43-46). While the testimony is inconsistent as to just when Percy pulled out a gun, it is clear that he had done so by this time. (Tr. 43-46). While Percy was being pushed out the door, the gun fired and Mr. Dunietz fell to the floor. (Tr. 28, 40, 43-46). At this point, the appellant and Percy fled. (Tr. 43-46). Mr. Dunietz was pronounced dead at 2:00 P.M., as a result of the bullet wound. (Tr. 25).

While $46.00 was subsequently found under a porch in the neighborhood of the occurrence, along with Percy's shirt and gun, there was no testimony as to where that money came from.

(Tr. 67, 133-135). Also, while the appellant allegedly admitted to two third persons that he and Percy obtained $60.00 to $90.00 from the market, Mrs. Dunietz emphatically denied that there was any money missing from the market or that there had been a robbery. (Tr. 66, 103, 113, 154).

It was also reported that after the occurrence the appellant had stated that Percy should not have shot Mr. Dunietz. (Tr. 102, 112).

STATUTES INVOLVED

Title 22, District of Columbia Code (1967 Ed.), Section 2401 provides:

> Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premediated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402, rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon is guilty of murder in the first degree.

Title 22, District of Columbia Code (1967 Ed.), Section 2403 provides:

> Whoever with malice aforethought, except as provided in sections 22-2401, 22-2402, kills another, is guilty of murder in the second degree.

Title 22, District of Columbia Code (1967 Ed., 1970 Supplement), Section 2901 provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than two years nor more than fifteen years.

Title 22, District of Columbia Code (1967 Ed.), Section 3202 provides in pertinent part:

> If any person shall commit a crime of violence in theDistrict of Columbia when armed with or having readily available any pistol or other firearm, he may in addition to the punishment provided for the crime, be punished by imprisonment for a term of not more than five years . . .

Title 22, District of Columbia Code (1967 Ed.), Section 105 provides:

> In prosecution for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding and abetting the principal offender shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes whatever the punishment may be.

SUMMARY OF ARGUMENT

I. There was insufficient evidence for a reasonable person to find beyond a reasonable doubt that the appellant associated himself with and participated in the second degree murder unexpectedly committed by Percy while in a physical tussle with the decedent or that he wished such a result, especially in the light of the appellant's later statement that Percy should not have shot the man.

II. The evidence of $46.00 found with an article of Percy's clothing in the neighborhood of the scene of the occurrence and the alleged admissions of the appellant that $60.00 to $90.00 had been obtained from the store was insufficient evidence that appellant robbed the store in light of the emphatic denial of Mrs. Dunietz that any money was taken from the store or that a robbery occurred.

ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE FOR THE JURY TO FIND THE APPELLANT AIDED AND ABETTED IN SECOND DEGREE MURDER.

(Pertinent parts of record: Defendant's Motion for Judgment of Acquittal NOV, Tr. 28, 39, 40, 43-46, 102,112)

Count I of the indictment charged the appellant with felony (first degree) murder and the trial Court instructed the jury as to second degree murder as a lesser, included offense of felony murder with the charge that second degree murder should be considered only in the event that the jury found the appellant not guilty of felony-murder.(1)

The only element of the crime of felony-murder not present in the crime of second degree murder is the commission of one of the felonies enumerated in the felony-murder statute,(2) the only such felony pertinent to this case being robbery or its attempt. Therefore, by finding the appellant not guilty

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(1) Tr. 213, 214. Such an admonishment being dictated by Fuller v. United States, 132 U.S. App. D.C. 264, 295 and 297, 407 F2d 1199, 1230 and 1232 (1968) cert. denied 89 S. Ct. 99.

As to the propriety of an instruction to the effect that second degree murder is a lesser included offense of felony-murder, see Fuller v. United States, supra, at 292-95, 407 F 2d at 1227-30.

(2) District of Columbia Code (1967 Ed.), Title 22, Section 2403

of felony-murder but guilty of second degree murder, the jury had to have determined that there was no robbery or attempted robbery in this case and that the homocide was an intentional killing on impulse-or with malice aforethought.(3)

Since all the evidence elicited at trial placed the murder weapon in the hand of Percy at the time of the homocide, it is equally certain that the jury based its finding of appellant's guilt on the theory that he aided and abetted Percy in the commission of the second degree murder.

The Supreme Court has held that:

> In order to aid and abet another to commit a crime it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.(4)

On another occasion that Court stated that a defendant aids and abets when he "consciously shares in a criminal act."(5)

(3) See Fuller v. United States, supra, note 1, at 294, 407 F2d at 1229.

(4) Nye & Nissen v. United States, 336 U.S. 613, 619 (1949) quoting from L. Hand, J. in United States v. Peoni, 100 Fed. 2d 401, 402.

(5) Pereira v. United States, 347 U.S. 1, 11 (1953).

Likewise, this Court has held that to be an aider and abetter one must have "guilty knowledge". Kemp v. United States, 114 U.S. App. D.C. 88, 331 F2d 774 (1962)

The Government's evidence in this case overwhelmingly supported the view that the appellant not only did not know that Percy was going to commit murder but that the appellant did not want the murder to occur. All the evidence as to the circumstances of the shooting was that it occurred in the middle of "a tussle", "pushing and shoving" between the decedent and Percy.(6) Perhaps the Government's most precise witness, Mr. Jones, testified that while the decedent was pushing the appellant and Percy out of his store, Percy drew a gun from his vest pocket and shot the decedent.(7) Later in the trial, another Government witness, Jacqueline L. Jenkins, stated that shortly after the murder she heard the appellant say that Percy should not have shot the man.(8) The most rational conclusion concerning this, the Government's evidence, is that there was no knowledge on the part of appellant that Percy was going to murder the decedent, but that the murder occurred unexpectedly as a result of the physical struggle

(6) Tr. 28, 39, 40, 43, 46
(7) Tr. 43-46
(8) Tr. 102, 112

Even if appellant had been in sympathy with Percy in the commission of the murder, that would not have rendered him an aider and abetter. Johnson v. United States (8th Cir.) 195 F2d 673, 675-676 (1952)

between Percy and the decedent. There simply was not sufficient evidence for a reasonable man to have found beyond a reasonable doubt that the appellant

> ... participated to some extent in the commission of [second degree murder] with the intention of so participating and with the knowledge of the [murder] that was about to be committed and in which he was participating * * * [or that he] knowingly associate[d] himself with the [murder] (9)

From this evidence, it can not be said beyond a reasonable doubt that the appellant participated in the murder as something that he wished to bring about and that he sought by his action to make succeed.(10)

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(9) From trial Court's instructions to jury on aiding and abetting. Tr. 205.

(10) See Nye & Nissen v. United States, supra, n. 4, at 619 The case of Long v. United States, 124 App. D.C. 14, 360 F2d. 829 (1966) is distinguishable because (1) the Court in Long affirmed the conviction of the aider of felony-murder primarily on the basis that once he learned of the killing which took place during the robbery, he continued to assist the principals by driving the get-away car. In the present case, there was no evidence that appellant assisted Percy in any way after the killing. (2) In Long, the aider was convicted of felony-murder and his assistance in the robbery might be attached to the murder. Here, the jury found there was no robbery and convicted appellant of second degree murder. Thus, there must be sufficient evidence of aiding in the murder itself, which there was not.

II THERE WAS INSUFFICIENT EVIDENCE FOR THE JURY TO FIND APPELLANT GUILTY OF ROBBERY WHILE ARMED.

(Pertinent parts of record: Defendant's Motion for Judgment of Acquittal NOV Tr. 29, 32, 39, 66, 80-82, 91-103, 111, 134-135, 154-156)

One of the essential elements of the crime of robbery is that the perpetrator take from another's possession something of value.(11) Mr. Conic and the decedent's wife, the only two people in the store other than the perpetrators and the decedent, were both in close proximity to the cash register at the time of the occurrence.(12) Their uncontroverted testimony was that neither appellant nor Percy took anything from the cash register.(13) In fact, the decedent's wife emphatically stated that "there was no robbery",(14) and that the money remained in the cash register and the $105.00 on the person of her husband at the time of the occurrence was returned to her by the Hospital to which he was taken.(15)

The only evidence supporting a finding that there was a robbery was the appellant's alleged admission thereto to Carolyn Jenkins (16) and Jacqueline Jenkins.(17) On cross-examination,

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(11) District of Columbia Code (1967 Ed. 1970 Supp.) Title 22, Section 2901.
(12) Tr. 32, 155
(13) Tr. 29, 39, 154
(14) Tr. 154
(15) Tr. 154-156
(16) Tr. 66
(17) Tr. 103

both these witnesses admitted that they did not tell the police of these admissions when first questioned, but only after the police caused them to fear that charges would be placed against them.(18) Also, $46.00 was admitted into evidence as having been found with a gun and some orange clothing of Percy's under a porch,(19) but there was no testimony as to where it came from, and in light of the strong testimony of Mrs. Dunietz that no money was taken from the store, it is submitted thatno reasonable man could find beyond a reasonable doubt that any money was taken from the store.(20) In keeping therewith, it is further submitted that there was insufficient evidence for the jury to have found the appellant guilty of committing a robbery.

CONCLUSION

WHEREFORE, it is respectfully submitted that the trial Court's denial of the Motion for Judgment of Acquittal NOV

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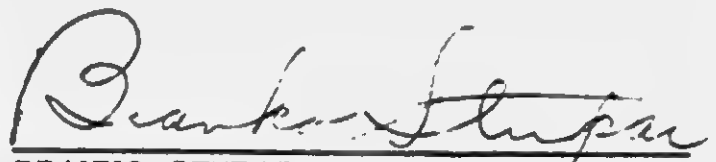
(18) Tr. 80-82, 91, 111

(19) Tr. 134-135

(20) While it is not made certain by the transcript, the words used by the decedent's wife in her testimony (Tr. 153-157) clearly indicate that they worked together in operating the store and that she would have known if any money had been taken.

Also, the $46.00 does not fit with the amount appellant was alleged to have admitted obtaining: $60.00 or $90.00 with $10.00 for himself. (Tr. 66, 103, 113).

as to the charges of second degree murder and robbery while armed be reversed or, in the alternative, the case on these charges be remanded to the District Court for a new trial.



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Cr. No. 1752-68

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ISSUES PRESENTED *

In the opinion of appellee, the following issue is presented:

Was the evidence sufficient to support appellant's conviction?

* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a seven-count indictment filed November 4, 1968, appellant was charged with first-degree felony murder (killing while perpetrating the crime of robbery), in violation of 22 D.C. Code § 2401; first-degree premeditated murder, also in violation of 22 D.C. Code § 2401; armed robbery, in violation of 22 D.C. Code §§ 2901 and 3202; robbery, in violation of 22 D.C. Code § 2901; and three counts of assault with a dangerous weapon, in violation of 22 D.C. Code § 502. After a trial by jury in the District Court before the Honorable Howard F. Corcoran on August 18, 19 and 20, 1969, appellant was found guilty

of second-degree murder as a lesser included offense of felony-murder, guilty of armed robbery, and guilty on two counts of assault with a dangerous weapon. The jury found appellant not guilty on one count of assault with a dangerous weapon. Prior to the submission of the case to the jury, the court, on appellant's motion, dismissed the second count of the indictment charging appellant with first-degree premeditated murder. On October 2, 1969, the trial court denied appellant's "motion for judgment of acquittal N.O.V. or in the alternative for a new trial." On November 7, 1969, appellant was sentenced to imprisonment for ten to thirty years for second-degree murder, ten to thirty years for armed robbery, and three to ten years for each of the two counts of assault with a dangerous weapon, all the sentences to run concurrently with each other and concurrently with the sentence imposed in an unrelated case. This appeal followed.

The Government's Case

At the outset of the trial it was stipulated that the body of the deceased, Solomon Dunietz, was identified by his wife, Mrs. Genia Dunietz, and by his daughter, Mrs. Doz Shapiro. Further it was agreed that Deputy Coroner William J. Brownlee conducted an autopsy on the body of the deceased on September 19, 1968, and concluded that the cause of death was "massive hemorrhage, secondary to gunshot wound of the chest via the lung and heart." It was also stipulated that during the autopsy a bullet was recovered and duly turned over to the Metropolitan Police (Tr. 25).

Lemuel H. Conic testified that on September 19, 1968, at around 1:15 p.m. he was shopping for groceries in the Gallaudet Market, 2001 Gallaudet Street, Northeast. The owner of the market, Solomon Dunietz, had taken Conic's meat order and was bringing the meat to the front counter when he stopped by the frozen food box and talked to two young men about the price of beer (Tr. 27, 31-32). Conic overheard part of their conversation but could not

remember the exact words. Eventually the two men left the store.

Conic was the only customer in the store after the men left. After he received his change for the purchase of his groceries from Mr. Dunietz's wife, who worked behend the counter, he started to put his money away when the same two men "rushed" back into the market (Tr. 27, 33). One was armed with a pistol which was visible as he entered (Tr. 28, 33). The armed man first passed Conic and headed in the direction of the rear of the store. The other man also went by him (Tr. 33-34).[1] Conic heard one of the men say, "This is it," and about that time Conic attempted to run out of the store. He was, however, caught from behind and thrown by his shoulders to the floor (Tr. 28). From that vantage point Conic saw that the armed man was struggling with Mr. Dunietz while the other man held his wife (Tr. 28). Mrs. Dunietz exclaimed, "Don't do it. Don't do it." (Tr. 28.) The pistol was pointed at Mr. Dunietz, and he was shot just as he "pushed [the armed man] away" (Tr. 40). Fatally wounded by the gunshot, Dunietz at first headed for the rear of the store, then turned around and started toward the front exit. He did not reach the outside, however, but lay down on the floor of the store (Tr. 28).[2] The two men ran out of the store, and moments later the police were called by Mrs. Dunietz (Tr. 28).

Conic testified he did not see either of the two men take any money from either the cash register or the pockets of the proprietor (Tr. 29). He explained, however, that from his position on the floor he could not see the cash register (Tr. 39).

Russell E. Jones testified that on September 19, 1968, he worked near the Gallaudet Market and that around

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[1] Defense counsel attempted to impeach Conic by a prior statement wherein he stated that one of the men stayed by the front door of the market (Tr. 34-36).

[2] Solomon Dunietz was pronounced dead at 2:00 p.m. on September 19, 1968 (Tr. 25).

1:00 p.m. he was in an automobile stopped momentarily in front of the market (Tr. 42-43). He heard screaming from the market and observed Mr. Dunietz attempting to push two men out of his store. One man had just drawn a gun from his vest pocket, and he shot Mr. Dunietz (Tr. 43, 45). The two men ran down the steps, and the armed man pointed the gun at Jones and told him to "shut up" (Tr. 43, 46-47). Both men ran away together and were last seen heading towards a lot near an apartment building (Tr. 43, 47). According to Jones, the men wore bright orange-colored clothing (Tr. 44).

The two men were also seen escaping by John T. Hockey,[3] who, in the course of his employment as a driving instructor, was only one block away from the Gallaudet Market at the approximate time of the robbery (Tr. 49-50, 56). Hockey testified that he observed two men dressed in "burnt orange type clothing" running through a lot. One man ran past him while the other fell to the ground (Tr. 50). The second man got up and thereafter rejoined his companion in their flight from the area. Hockey later gave a statement to the police (Tr. 59).

On September 20, 1968, Hockey saw a picture of appellant in the newspaper and told his wife, "Well, they caught the guys that did the killings down on Gallaudet Street" and then stated, "He [appellant] was the first one that ran past me" (Tr. 50, 60-61). Hockey similarly testified before the jury that appellant was the man who ran past him on September 19 (Tr. 53). The distinguishing feature drawing Hockey's attention to appellant, both on the day of the robbery and on the day his picture was in the paper, was appellant's unusual nose (Tr. 53, 60). Hockey's testimony at the trial was

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[3] Immediately prior to trial the defense attorney sought to suppress the identification testimony of this witness (Tr. 8-13). Following the testimony of Hockey and argument of counsel, the court denied appellant's motion and permitted the Government to introduce Hockey's in-court and pretrial identification (Tr. 12-13). That ruling is not challenged on appeal.

that appellant "appears to be the man I saw come past me" (Tr. 53).[4]

Appellant was not apprehended until several hours later that same day. Carolyn Marie Jenkins, a friend of appellant, testified as to the events leading up to his arrest and described appellant's activities on the night before the actual robbery. Miss Jenkins was in appellant's company on the evening of September 18. She was with her aunt, Jacqueline L. Jenkins, when the two of them met appellant and Percy Floyd at a bar (Tr. 64). The group remained together until about 5:00 a.m. the next morning, when appellant took the girls home. On the way to their home appellant asked Carolyn Jenkins to lend Percy Floyd a gun which she had in her apartment (Tr. 65, 72, 82, 87-88). According to Miss Jenkins, appellant said that Percy Floyd wanted some money for his girl friend (Tr. 71-72). Carolyn Jenkins said she complied with appellant's request and gave Floyd a container which held a gun and some ammunition (Tr. 68).

Around 4:30 p.m. the same day, September 19, appellant telephoned Carolyn Jenkins and said he was coming over to see her. When appellant arrived, he observed on a table a Washington Daily News which contained an article about the slaying of a man in Northeast Washington (Tr. 65). In reference to that story appellant said, "That was me and Shorty [Percy Floyd]" (Tr. 65, 68, 69, 85). According to Miss Jenkins, appellant told her that he and Floyd went into the market and inquired about the price of beer (Tr. 65, 85-86, 89). They left and returned to find a man and some children

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[4] Appellant's trial counsel introduced a prior written statement in which Hockey said, "I might have known them if I saw them again" (Tr. 59). Hockey explained that in this statement he did not want to commit himself. Appellant's trial counsel also introduced Hockey's statement at the pre-trial suppression hearing that appellant "looks like the man" (Tr. 60).

[5] Miss Jenkins identified the weapon introduced at trial as the same gun she gave to Percy Floyd (Tr. 66).

in the store in addition to the "dead man" (Tr. 66). Appellant admitted to Miss Jenkins that he grabbed the man because the man was trying to leave, that Floyd struggled with the owner of the store and that the gun discharged (Tr. 66). Miss Jenkins at one point in her testimony recalled that appellant said Floyd pointed the gun at the owner's head and stated, "Give it up" (Tr. 93). Appellant told Miss Jenkins that they got between $60 and $90 from the market but that he "didn't get any money but approximately ten dollars that he had hid underneath the porch with the gun and his shirt" (Tr. 66-67).

Eventually appellant, Miss Jenkins and her aunt, Jacqueline Jenkins, left the apartment. They caught a cab to pick up a Cadillac which was parked on Central Avenue (Tr. 66-68). During the ride appellant asked both girls to say, if they were stopped by the police, that he had been with them all day and the previous night (Tr. 67-68). When they arrived in the vicinity of the Cadillac, some police officers stopped appellant as he was getting into the car and placed him under arrest, and all were taken to police headquarters (Tr. 66, 76-78).[5]

Miss Jenkins' aunt, Jacqueline Jenkins, also testified as to the meeting with appellant the night before the robbery and the fact that in the early morning hours of September 19 her niece gave Percy Floyd a container with a gun inside (Tr. 101, 105-106). Later that day, around 5:00 p.m., Jacqueline Jenkins was in the bathroom when appellant arrived at her apartment (Tr. 102). She overheard appellant say, "Percy didn't have to shoot the man," and further, that he and Percy went into the store and that the latter "put the gun up to

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[5] Defense counsel attempted to impeach Miss Jenkins with a written statement that she gave to the police the night of appellant's arrest. As developed on cross-examination, Miss Jenkins' second statement to the police was different and more incriminating to appellant (Tr. 78, 87). Counsel's apparent theory in trying to impeach this witness was to suggest that the latter statement was made under a threat of prosecution.

the man's head and told the man that his was a holdup" (Tr. 102-103, 112-113, 116). The aunt testified that appellant said they got $60 and that his share was only $10 (Tr. 103, 113). Appellant also discussed the fact that he hid under a porch after the robbery was over (Tr. 103).[7]

Latent fingerprints were taken from the scene of the crime by Officer Harry A. Schwab and evaluated by an expert in fingerprint identification, Officer Donald R. Nichols of the Metropolitan Police. Officer Nichols concluded that, in his expert opinion, the latent fingerprints were identical to a known fingerprint of appellant (Tr. 126). Further, the jury learned that the various items introduced into evidence, a gun, a sports coat, $46 in one-dollar bills and a sweater, were all recovered from underneath a porch at 1827 Corcoran Street, Northwest (Tr. 133). Moreover, an F.B.I. agent, Warren G. Johnson, who was qualified as an expert, testified that the recovered gun had fired the bullet which was recovered from the deceased (Tr. 141).

The Defense

Appellant did not take the stand to testify. His defense was based solely on the testimony of the decedent's wife, Mrs. Dunietz, taken at the preliminary hearing on October 1, 1968 (Tr. 153-157). Mrs. Dunietz was out of the country and unavailable to testify at the time of trial (Tr. 151-152).

In the course of her brief testimony before the United States Commissioner, Mrs. Dunietz stated that she told her daughter, "Nobody robs me. The money is in the [cash] register . . . . They just killed my husband, that is all." (Tr. 154.) On cross-examination she stated that the hospital returned her husband's wallet with $105. Additionally, Mrs. Dunietz testified that her deceased

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[7] Jacqueline Jenkins, of course, was also present at appellant's arrest and was taken down to the police station. Her statement to the police, like that of her niece, was in two parts (Tr. 109-112).

husband also used to carry money in his pocket, but that she did not know if any money was recovered by the hospital from his pockets (Tr. 156).

ARGUMENT

There was sufficient evidence to sustain appellant's conviction.

(Tr. 3-158)

A. Felony murder—despite the not guilty verdict of the jury

Appellant contends the jury verdict finding appellant not guilty of felony murder means that the jury concluded there was no robbery or attempted robbery in this case. That interpretation is quite contrary to the jury verdict: appellant was in fact *convicted* of armed robbery.

Appellant was charged with various offenses all arising out of a murder and robbery committed on September 19, 1968. Appellant was originally indicted on one count of felony murder and one count of premeditated murder. All participants in the trial were in accord that, on appellant's motion, the latter count of the indictment should be dismissed because of a lack of proof on premeditation and deliberation and that the jury should be allowed to consider second-degree murder only as a lesser included offense of felony murder (Tr. 159-160). *Fuller v. United States*, 132 U.S. App. D.C. 264, 407 F.2d 1199 (1968) *(en banc)*, *cert. denied*, 393 U.S. 1120 (1969).

We maintain that the jury *could* have found appellant guilty of felony murder based upon the evidence, but that the jury more than likely compromised to avoid the harsh consequences of a first-degree murder verdict. The court quite clearly explained the severe punishment alternatives available upon a verdict of first-degree murder. (Tr. 211-213). The jury was told that if they could not agree on punishment the court had no choice under the statute but to sentence appellant to either life or

death: "*The burden* will be put upon the court to either impose life imprisonment or the penalty of death" (Tr. 213) (emphasis added). Since appellant had not wielded the gun which killed Mr. Dunietz, it is understandable that the jury might not wish so to limit the court's sentencing alternatives by returning a guilty verdict on the felony murder count. The case law clearly permits the result reached. *Fuller* v. *United States*, *supra*, 132 U.S. App. D.C. at 297, 407 F.2d at 1232; see *United States* v. *Fox*, D.C. Cir. No. 22,785, decided June 30, 1970, slip op. at 6 and n.21, citing among other cases *Jackson* v. *United States*, 114 U.S. App. D.C. 181, 183-184, 313 F.2d 572, 574-575 (1962). We submit that the jury's verdict indicates only that appellant was the beneficiary of the jury's mercy and therefore can have no complaint on this ground.

B. *Second-degree murder*

Appellant argues that the Government failed to show that he had any knowledge that Perry Floyd was going to murder the owner of the market and that therefore no reasonable person could find appellant guilty of second-degree murder. We respectfully submit that appellant misconceives both the law and the evidence in this case.

In *Fuller* v. *United States*, *supra*, the Court resolved the question of whether second-degree murder, with its requirement of malice, can be a lesser included offense of felony murder. The latter offense does not require affirmative proof of malice. As the *Fuller* opinion noted, "At common law . . . killings in the course of a felony were murders because they were considered killings done with 'malice' on a theory of transferred intent." 132 U.S. App. D.C. at 293, 407 F.2d at 1228. The Court found ample precedent in this jurisdiction to warrant an instruction by the trial court that second-degree murder can, in appropriate cases, be a lesser included offense of felony murder. The District Court in the case at bar

gave a full instruction on malice.[8] The instruction indicated in part that the jury could infer malice "from the circumstances of the killing" and when the "act which imports danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life . . . ."

Contrary to appellant's evaluation of the evidence, appellee reads the record as clearly showing appellant's complete awareness of the possible consequences of the use of the weapon. Appellant's friend, Carolyn Jenkins, stated that on the very morning of the robbery it was appellant who asked that she give Perry Floyd a gun in order that Floyd would be able to get some money for his girl friend (Tr. 65, 71-72, 82, 87-88). Appellant quite candidly admitted to two Government witnesses the details of the robbery and murder of the owner of the market. He told Carolyn Jenkins that he grabbed

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[8] The Court gave the following instruction:

Let us turn to the second element, that the defendant acted with malice when he wounded the deceased.

Malice is defined this way: It does not necessarily imply ill will, spite, hatred or hostility toward the person killed. Malice is a state of mind showing a heart regardless of life and the safety of others, a mind deliberately bent on mischief, a generally depraved, wicked and malicious spirit.

Malice may also be defined as the condition of mind which prompts a person to do willfully, that is, on purpose, without adequate provocation, justification or excuse, a wrongful act whose foreseeable consequence is death or serious bodily injury to another.

Malice may be either express or implied. Express malice exists when one unlawfully kills another in pursuance of a wrongful or unlawful purpose without a legal excuse. Implied malice is such as may be inferred from the circumstances of the killing, as for example, where the killing is caused by the intentional use of fatal force without circumstances serving to mitigate or justify the use of that fatal force.

In second degree murder, there is an additional element to be considered in determining whether or not the defendant acted with malice. This additional element is that the malice may be inferred when an act which imports danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life and such act results in the death of another human being. You may infer malice in those circumstances but you are not required to do so. (Tr. 214-215.)

one man in the store when he attempted to leave (Tr. 66). Although appellant was later overheard to say, "Perry didn't have to shoot the man," we maintain nevertheless that this statement lends no support to appellant's argument that the murder occurred unexpectedly without any knowledge on his part.

The trial court did not specifically instruct the jury that they might infer, but were not required to find, the existence of malice from the use of a deadly weapon in the commission of the homicide. Clearly the case law would have supported such an instruction. *Mitchell* v. *United States*, D.C. Cir. No. 27,052, decided May 13, 1970, slip op. at 10 n.8; *Green* v. *United States*, 132 U.S. App. D.C. 98, 405 F.2d 1368 (1968); *Belton* v. *United States*, 127 U.S. App. D.C. 201, 382 F.2d 150 (1967). Since appellant assisted in the procuring of the weapon and knowingly associated himself with the man wielding the weapon in the course of a robbery, we maintain that there was ample evidence to establish appellant's guilt of second-degree murder.[9]

C. *Armed Robbery*

Appellant contends that no reasonable man could find beyond a reasonable doubt that any money was taken from the store. In so arguing, however, he necessarily rejects the testimony of two witnesses and thereby usurps the function of the jury.

Carolyn Jenkins testified that appellant told her the day of the robbery that he got $10 of the $60 to $90 taken from the market (Tr. 66-67). Miss Jenkins' aunt corroborated appellant's share of $10 and the total figure of $60 (Tr. 103, 113). Appellant attempts to negate the effect of this testimony by a statement of the wife of the deceased some two weeks after the incident. Giving

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[9] The Government's theory was that appellant aided and abetted in the commission of the robbery and murder. There was an abundance of evidence showing that he knowingly associated himself with the criminal venture. *Long* v. *United States*, 124 U.S. App. D.C. 14, 360 F.2d 829 (1966).

appellant's argument more credit than its worth, we respectfully submit that an obvious jury question was presented and resolved adversely to appellant. That ends the matter.

CONCLUSION

WHEREFORE, appellee respectfuly submits that the judgment of the District Court should be affirmed.

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REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 23,771

UNITED STATES OF AMERICA, APPELLEE

v.

ODELL GRIFFIN, APPELLANT

Appeal from the United
States District Court for
the District of Columbia

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INDEX

TABLE OF CASES

OTHER REFERENCES

*Cases chiefly relied upon are marked by an asterisk

UNITED STATES COURT OF APPEALS
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v.

ODELL GRIFFIN, APPELLANT

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REPLY BRIEF FOR APPELLANT

ISSUES PRESENTED

1. Should this Court consider appellant's armed robbery conviction in reviewing the jury's finding him guilty of second degree murder?

2. Did the Government meet its burden of showing beyond a reasonable doubt that appellant participated in the murder as something he wished to bring about?

ARGUMENT

I In Reviewing the Propriety of the Jury's Finding of Appellant's Guilt of Second Degree Murder, This Court May Not Consider Appellant's Conviction of Armed Robbery

The appellant was convicted of both second degree murder, as a lesser included offense of felony-murder, and armed robbery in two separate and distinct counts of the indictment.

The jury was told that as to the felony-murder count, it could find the appellant guilty of the lesser included offense of second degree murder only if it found him not guilty of felony-murder(1), such an instruction being required by Fuller v. United States, 132 U.S. App. D.C. 264, 407 F2d 1199 (1968) cert. denied, 393 U.S. 1120 (1969). Thus, in finding appellant guilty of second degree murder, the jury had to have determined that there was no other felony committed.

Notwithstanding such a determination, the jury thereafter, in another count of the indictment, found that the appellant was guilty of armed robbery. These two findings are obviously inconsistent. Appellee argues that since the inconsistency is permissible,(2) this Court should consider the conviction of

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(1) Tr. 213, 214

(2) See Dunn v. United States (1932) 284 U.S. 390 and United States v. Daigle (1957) 149 F. Supp. 409, Aff. 248 F2d 603, 101 U.S. App. D.C. 286, Cert. denied 355 U.S. 913

armed robbery while determining the propriety of the conviction of second degree murder.

While appellant agrees that under present law the two findings are permissibly inconsistent, he strongly objects to this Court's use of the armed robbery conviction in reviewing the second degree murder conviction. While a verdict on two different counts need not be consistent with each other, the verdict as to each count must be consistent in itself. In other words, the question is whether a verdict of guilty as to any one count is supported by the evidence as to that count. Each count of an indictment is to be viewed as a separate indictment.(3)

Thus, this Court in reviewing the second degree murder conviction is limited to only that conviction and the evidence in support thereof, just as if the armed robbery conviction was in another indictment and another case.

II Appellee Failed to Show that Appellant Participated in Second Degree Murder as Something He Sought to Bring About

Appellee argues that since appellant was found guilty of second degree murder as a lesser included offense of felony-murder and since the appellant was convicted of the felony of

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(3) Dunn v. United States, supra, n. 2 at 236 U.S. 393 and United States v. Daigle, supra, n. 2 at 149 F. Supp. 413

armed robbery, all the Government had to show was that appellant aided and abetted in the robbery with the intent of making it successful to establish that appellant aided and abetted in the second degree murder under the authority of Long v. United States, (1966), 124 U.S. App. D.C. 14, 360 F2d 329.(4)

However, for the reasons stated in the previous part, this Court may not consider appellant's conviction of armed robbery in weighing the propriety of the murder conviction. Furthermore, contrary to Long, in this case the jury found that as to the murder count there was no additional felony committed.(5)

Under these circumstances, in order for the jury to properly have found appellant guilty of second degree murder, the Government would have had to prove beyond a reasonable doubt that the appellant participated in the murder as something which he wished to bring about.(6) The evidence elicited at trial showed to the contrary that the murder was committed unexpectedly by Percy while ~~the latter~~ he was in the midst of a fight with the decedent, and that thereafter appellant stated that Percy should not have shot the man.(7)

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(4) Appellee's Brief, p. 11 and n.9

(5) Fuller v. United States, supra, at 132 U.S. App. 294, 407 F2d 1129

(6) See Appellant's Brief, p. 3 and the authorities cited therein

(7) Tr. 23, 39, 40, 43, 46, 102, 112

For these reasons, there was insufficient evidence for the jury to have found appellant guilty of second degree murder.

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